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No. _____

In The

# Supreme Court of the United States

OCTOBER TERM 1996

CONCOURSE NURSING HOME,

*Petitioner,*

v.

CESAR A. PERALES, individually and as Commissioner of the New York State Department of Social Services, LORNA H. McBARNETTE, individually and as Acting Commissioner of the New York State Department of Health, and PATRICK BULGARO, individually and as Budget Director of the State of New York,

*Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK SUPREME COURT APPELLATE DIVISION, FIRST DEPARTMENT

## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

**(i)**

Whether a state court can dismiss a valid federal claim arising under 42 U.S.C. § 1983 ("1983 claim" or "1983 action") commenced in state court by converting such § 1983 claim into an alternate state form of action and then applying thereto a shorter,and in this case an expired limitations period, for the alternate form of claim?

**(ii)**

Can a state court dismiss a valid federal claim having its own applicable statute of limitations and impose on the petitioner litigant the shorter statute of limitations of an available state form of action when petitioner expressly elected the federal claim with its own federally created statute of limitations?

**(iii)**

Whether a state court can *finally* dismiss a federal claim based upon state law rules of pleading when as a matter of federal law, pleadings can be liberally amended in federal cases which rules had they been applied would have entitled petitioner to replead its claim?

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# Supreme Court of the United States

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CONCOURSE NURSING HOME,

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v.

CESAR A. PERALES, individually and as Commissioner of the New York State Department of Social Services, LORNA H. McBARNETTE, individually and as Acting Commissioner of the New York State Department of Health, and PATRICK BULGARO, individually and as Budget Director of the State of New York,

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## PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK SUPREME COURT APPELLATE DIVISION, FIRST DEPARTMENT

## I.
## REPORTS OF OPINIONS DELIVERED BELOW

The opinion of the New York State Supreme Court, which is not officially reported, appears in Appendix "D" hereto at 17. The opinion of the New York State Supreme Court, Appellate Division, First Department ("Appellate Division"), is officially reported as *Concourse Nursing Home v. Cesar A. Perales*, 631 N.Y.S.2d 156, __A.D.2d__(1st Dep't 1995) and appears in Appendix "A" hereto at 3. The subsequent denial of petitioner's motion to the Appellate Division for reargument or for leave to appeal to the Court of Appeals is

not officially reported but appears in Appendix "B" hereto at 9-10. The denial of the motion to the Court of Appeals for leave to appeal to it is not officially reported and appears in Appendix "C" hereto at 11.

## II.
## STATEMENT OF JURISDICTIONAL GROUNDS

The Decision/Order of the Appellate Division is officially reported as *Concourse Nursing Home v. Cesar A. Perales*, 631 N.Y.S.2d 156, __A.D.2d__(1st Dep't 1995) and it appears in the Appendix "A" at A 3.[1] Thereafter, Concourse Nursing Home ("Concourse") filed a motion at the Appellate Division for reargument or, alternatively, for leave to appeal to the Court of Appeals from the decision of the Appellate Division. The denial of that motion appears in Appendix "B"hereto at A 8. Concourse then filed a motion for discretionary review pursuant to New York Civil Practice Law & Rules("CPLR") 5602 and 5513 for leave to appeal to the Court of Appeals. The denial of this motion was entered on April 2, 1996 and appears in Appendix "C" hereto at A 11.

In accordance with Rule 13.1 of this Court's Rules this petition is filed within 90 days of the date of the denial of the motion for leave to appeal to the New York State Court of Appeals. The jurisdiction of this Court is invoked under 28 U.S.C.§ 1257(a) (1988) because the Decision/Order of the Appellate Division sought to be reviewed deprives petitioner of its rights and privileges claimed under the statutes of the United States.

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[1] All references to the appendix are referred to as "A__."

## III.
## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

### A. Constitutional Provisions

The "Supremacy Clause" of the United States Constitution, U.S. Const. art. VI, cl. 2, provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const. amend. XIV Section 1 provides, in relevant part that:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

**B. Statutory Provisions**

42 U.S.C. § 1396 Sec. 1396a. provides, in pertinent part:

(a) Contents

A State plan for medical assistance must— ...

(13) provide—

(A) for payment (except where the State agency is subject to an order under section 1396m of this title) of the hospital services, nursing facility services, and services in an intermediate care facility for the mentally retarded provided under the plan through the use of rates (determined in accordance with methods and standards developed by the State which, in the case of nursing facilities, take into account the costs (including the costs of services required to attain or maintain the highest practicable physical, mental, and psychosocial well-being of each resident eligible for benefits under this subchapter) of complying with subsections (b) (other than paragraph (3)(F) thereof), (c), and (d) of section 1396r of this title and provide (in the case of a nursing facility with a waiver under section 1396r(b)(4)(C)(ii) of this title) for an appropriate reduction to take into account the lower costs (if any) of the facility for nursing care, ... which the State finds, and makes assurances satisfactory to the Secretary, are reasonable and adequate to meet the costs which must be incurred by efficiently and economically operated facilities in order to provide care and services in conformity with applicable State and Federal laws, regulations, and quality and safety standards and to assure that individuals eligible for medical assistance have reasonable access (taking into

> account geographic location and reasonable travel time) to inpatient hospital services of adequate quality;and such State makes further assurances, satisfactory to the Secretary, for the filing of uniform cost reports by each hospital, nursing facility, and intermediate care facility for the mentally retarded and periodic audits by the State of such reports;
>
> (B) that the State shall provide assurances satisfactory to the Secretary that the payment methodology utilized by the State for payments to hospitals can reasonably be expected not to increase such payments, solely as a result of a change of ownership, in excess of the increase which would result from the application of section 1395x(v)(1)(O) of this title; ....

42 U.S.C. §1983 provides, in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

CPLR 7803 of the New York Civil Practice Law and Rules provides, in pertinent part that:

The only questions that may be raised in a proceeding under this article are:

> 1. whether the body or officer failed to perform a duty enjoined upon it by law; or
>
> 2. whether the body or officer proceeded, is proceeding or is about to proceed without or in excess of jurisdiction;or
>
> 3. whether a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion, including abuse of discretion as to the measure or mode of penalty or discipline imposed;or
>
> 4. whether a determination made as a result of a hearing held, and at which evidence was taken, pursuant to direction by law is, on the entire record, supported by substantial evidence.

Virginia Administrative Process Act:

§ 9-6.14:19 Court judgments.

> Unless an error of law as defined in s 9-6.14:17 appears, the court shall dismiss the review action or affirm the agency regulation or decision. Otherwise, it may compel agency action unlawfully and arbitrarily withheld or unreasonably delayed except that the court shall not itself undertake to supply agency action committed by the basic law to the agency. Where a regulation or case decision is found by the court to be not in accordance with law under s 9- 6.14:17, the court

shall suspend or set it aside and remand the matter to the agency for such further proceedings, if any, as the court may permit or direct in accordance with law....

RULE 2A:2. Notice of Appeal.

Any party appealing from a regulation or case decision shall file, within 30 days after adoption of the regulation or after service of the final order in the case decision, with the agency secretary a notice of appeal signed by him or his counsel. In the event that service of a case decision upon a party is accomplished by mail, 3 days shall be added to the 30-day period. Service under this Rule shall be consistent with s 9-6.14:14 and, if made by mail, shall be sufficient if sent by registered or certified mail to the party's last address known to the agency....

§ 9-6.14:16 Right, forms, venue.

A. Any person affected by and claiming the unlawfulness of any regulation, or party aggrieved by and claiming unlawfulness of a case decision, as the same are defined in s 9-6.14:4 of this chapter and whether or not excluded from the procedural requirements of Article 2 (s 9-6.14:7.1 et seq.) or 3 (s 9-6.14:11 et seq.)hereof, shall have a right to the direct review thereof by an appropriate and timely court action against the agency as such or its officers or agents in the manner provided by the rules of the Supreme Court of Virginia. Such actions may be instituted in any court of competent jurisdiction as provided in s 9-6.14:5, and the judgments of such courts of original jurisdiction shall be subject to appeal to or review by higher courts as in other cases unless otherwise provided by law. In addition, when

any such regulation or case decision is the subject of an enforcement action in court, the same shall also be reviewable by the court as a defense to the action, and the judgment or decree therein shall be appealable as in other cases.

## STATEMENT OF THE CASE

The important issue at stake in this case concerns the future of 42 U.S.C. § 1983 actions ("§ 1983 action" or "§ 1983 claim") in the New York State courts when there simultaneously exists a state form of action in the state court system. The Appellate Division decided this case in a way that abridges the *federal* rights of litigants such as, Concourse which have been already firmly established by this Court in *Felder v. Casey*, 487 U.S. 131, 108 S.Ct. 2302, 101 L.Ed.2d 123 (1988).The Appellate Division dismissed Concourse's § 1983 claim by holding that Concourse was limited by *state law* to bring its claim as an Article 78 proceeding under the CPLR ("Article 78 proceeding") and not as a federal § 1983 claim. The Appellate Division then proceeded to hold that as an Article 78 proceeding, this action was not commenced timely and, therefore, dismissed it on state statute of limitations grounds.

The Appellate Division further opined that the federal claims alleged in the complaint, *viz.*, the § 1983 claims, which pled violations of the Federal Medicaid law were pled in a *conclusory* manner such that they do not meet the requirements under *New York law* to render such a claim valid and, therefore, dismissed the complaint without leave to replead. Notwithstanding petitioner's belief that the federal § 1983 claim was sufficiently pled, petitioner believes that the Appellate Division was required to apply federal law in the instant federal case even though this case was brought in the

state court system. It, therefore, should have permitted Concourse to replead its complaint in accordance with federal law rather than dismissing it outright. The dismissal effectively rendered Concourse out of court and without a remedy.

Not only is this issue of converting "federal claims" into "state claims" by the use of some state crafted rule or test of "conclusoriness" of great significance to litigants of federal claims but from a practical standpoint, New York State's courts should not be allowed to transform federal claims to actions under state law because of New York State's significantly shorter statute of limitations for such proceedings. This, if allowed, would, in effect, deprive many litigants of their day in court. Also, challenges to the application of the Federal Medicaid regulation brought as federal claims in state courts will more and more likely be converted to claims under state law so that that state's shorter statute of limitations would apply.[2] Because of the current fiscal climate a state's shorter statute of limitations will be the vehicle used by more and more states to summarily cut off a litigant's claim. States experiencing severe fiscal and budgetary crises are under pressures to reduce the Medicaid reimbursement to providers of such services. By imposing the shorter statute of limitations of the alternate state forms of action rather than that of the elected federal form of action, Concourse's *bona fide* federal claim was rejected outright.

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[2] This has already happened to petitioner herein on other occasions in other unrelated but as yet nonfinal matters.

## STATEMENT OF FACTS

### PARTIES AND BACKGROUND

Concourse[3] was a healthcare facility licensed by the State of New York to operate a nursing home which rendered health care services to the people of the State of New York. Concourse participated as a provider of services in the Medicaid program pursuant to annually renewed "provider agreement" contracts. In excess of 90% of the income of Concourse was received by it for services rendered to Medicaid eligible persons.

In or about June 1987 the Department of Health ("DOH"), an administrative agency in the State of New York with jurisdiction to promulgate the rates of payment for Medicaid providers of services, notified all residential health care facilities ("facilities") in the State of New York that it promulgated the "recalibration" regulation which uniformly reduced by 3.035% all facilities'Medicaid reimbursement rates regardless of actual change experienced by a facility in its case mix index; an index used by the agency for the calculation of facilities' Medicaid rates. The recalibration regulation would be applied retroactively to January 1987. In or about June 1987, Concourse received rate computation notices for the first time reflecting the 3.035% recalibration effected reduced rate. Accordingly, Concourse timely appealed before the appropriate administrative agency, the DOH, its rates on the basis of, *inter alia,* the recalibration regulation being illegal. While Concourse's rate appeals were

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[3] Concourse is now being operated by a corporation under the name of Concourse Rehabilitation & Nursing Center, Inc.

pending and being processed by the DOH, the DOH distributed a letter dated April 30, 1991, industry-wide, which provided that objections to the rates on "methodology grounds" could not be appealed administratively.

Additionally, while Concourse's administrative appeals were pending, the New York State Court of Appeals in *NYSAC v. Axelrod*, 78 N.Y.2d 158, 573 N.Y.S.2d 25, 577, N.E.2d 16 (1991) affirmed the lower courts' invalidation and annulment of the recalibration regulation for rate periods 1987 and 1988. Nevertheless, DOH thereafter denied Concourse's rate appeals on the merits and in contravention of the aforesaid Court of Appeals' holding. Concourse subsequently filed a Level II appeal[4] for an administrative hearing at DOH because of the agency's improper continued application of the recalibration regulation which, as stated, the Court of Appeals invalidated. On or about December 23, 1991 DOH denied Concourse's Level II administrative appeal on the grounds that the issue was one of law which did not necessitate an administrative hearing.

Within four months of the denial of the Level II administrative appeal, on or about April 16, 1992 Concourse commenced the instant action in the state court under 42 U.S.C. § 1983 alleging that the DOH's continued application of the invalidated recalibration regulation as part of its Medicaid reimbursement rate violated its rights under the Federal Medicaid Act.

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[4] In the normal appeal procedure for facilities the exhaustion of administrative remedies procedure required two appeals before the process is considered complete and "final."

## PROCEEDINGS BELOW

At the state trial court, the New York Supreme Court, Concourse moved for summary judgment based on the Court of Appeals' holding that the recalibration regulation was invalid and that the State actors' continued application of the recalibration regulation to calculate its Medicaid rates violated Concourse's rights under the Federal Medicaid Act. The State defendants cross-moved for summary judgment on the grounds that Concourse's claims were interposed more than four months after the industry-wide letter; its action was, therefore, commenced beyond the *state Article 78* limitations period. The issue litigated at the trial level concerned what was the appropriate limitations period; the merits of the case were acknowledged by all to be clearly on the side of petitioner. Concourse argued that the appropriate period for a § 1983 action in New York was a three year period while the State defendants argued that the appropriate period was that of an Article 78 proceeding or four months. By decision dated January 7, 1994, the trial court granted Concourse summary judgment and denied the State defendants' cross-motion for summary judgment to dismiss the complaint based on the trial court's applying yet a different theory for arriving at a three (3) year statute of limitations.(A 17)The court based its decision on the fact that the Appellate Division, in the interim rendered a decision in which it held that a plaintiff alleging violations of the federal Medicaid Act had a three year limitations period in accordance with *state law*.(*New York City Health & Hospitals Corp. v. McBarnette*, 195 A.D.2d 391, 600 N.Y.S.2d 245 (1st Dep't 1993).

The State defendants appealed the denial of their cross-motion for summary judgment to the Appellate Division which, reversed the Order/Judgment of the Supreme Court, New York County by Decision dated September 7, 1995. The

Appellate Division essentially held that since the Appellate Division holding of the *McBarnette* case relied on by the trial court was subsequently reversed by the Court of Appeals the issue then became whether this action "could have been brought in the form of an Article 78 proceeding?"The Appellate Division held that *it could have been so brought*, and since it was not commenced within four months of the original rates being issued as is required of such state *actions*, this action was held to be untimely and was consequently, dismissed.

Concourse moved to reargue and/or alternatively, sought leave to appeal to the Court of Appeals because, as Concourse argued, it intentionally and appropriately commenced its §1983 action in state court notwithstanding that it may have possessed an alternate remedy under state law. As a result, it argued the statute of limitations to apply in the instant § 1983 case was that as established by this Court in *Wilson v. Garcia*, 471 U.S. 260, 105 S.Ct. 1938, 85 L.Ed.2d 254 (1985).The Appellate Division acted contrary to the laws established by this Court in *Felder, supra* and *Wilson v. Garcia, supra* by transforming a legitimate §1983 action to a claim under state law and then applying that state claim's particular statute of limitations. The Appellate Division denied Concourse's motion to reargue or, alternatively, for leave to appeal to the Court of Appeals which decision appears in the appendix herein at A 9-10.

Concourse, as required to in order to protect its interests and to obtain finality, then urged the Court of Appeals, in a motion for leave to appeal to the Court of Appeals to accept this case because the decision of the Appellate Division, *inter alia*,violated principles of law established by this Court and the Supremacy Clause of the U.S. Constitution. In a decision

appearing in the appendix herein at A 11, the Court of Appeals in a summary order denied the motion for discretionary review to its court.

## REASONS FOR GRANTING THE WRIT

### THIS CASE INVOLVES WHETHER THE STATE COURT HAS THE RIGHT TO TRANSFORM AND THEREBY TREAT A FEDERAL CLAIM AS A STATE LAW CLAIM AND APPLY THE STATE CLAIM'S STATUTE OF LIMITATIONS MERELY BECAUSE THE ACTION IS BROUGHT IN STATE COURT

The New York State Appellate Division decided this case in contravention to well established legal principles enunciated by this Court in *Patsy v. Bd of Regents of Florida*, 457 U.S. 496, 102 S.Ct. 2557, 73 L.Ed.2d 172 (1982), and in *Felder*, *supra*. *This* Court already confirmed that state courts are conferred with concurrent jurisdiction to hear claims under § 1983. Felder, *supra* at 2307; *Howlett v. Rose*, 496 U.S. 356, 110 S.Ct. 2430, 110 L.Ed.2d 332 (1990).Yet the Appellate Division in this case rejected Concourse's valid and selected § 1983 claim brought in the state court system. Instead that court transformed Concourse's claim into a state claim that exists in the state system, and applied thereto the significantly shorter limitations period of that state claim. The effect of transforming petitioner's claim into one under state law caused the claim to be untimely because of the shorter state law statute of limitations.

The underlying issue raised in this case is not new for this Court and would not need the Court's intervention but because of the Appellate Division's unique treatment of petitioner's

claim this Court is invited to protect Congress' and this Court's intentions regarding § 1983 claims brought in state court. This Court has ruled that federal law is to apply to § 1983 actions including the statute of limitations specific to a § 1983 claim. Felder, *supra*; *Howlett*, *supra*. *This* is so even though and *in spite* of the fact that there simultaneously exists an alternative state remedy with its own limitations period. A state should not be able to circumvent Congress' and this Court's intentions by means of a novel procedure not heretofore addressed by this Court.

### A. Petitioner Has a Valid § 1983 Claim Against the State for its Unlawful Refusal to Adjust Petitioner's Medicaid Rates to Reflect the Invalid Recalibration Regulation

This Court has often ruled that in enacting § 1983, Congress granted litigants the right to seek redress for conduct committed by individuals acting under "color of state law" which deprived them of rights, privileges or immunities secured by the Constitution or laws of the United States. Congress' principal objective in enacting the § 1983 type action as part of the Civil Rights Act of 1871 was to insure to individuals whose federal, constitutional or statutory rights were abridged, that they may obtain damages or secure injunctive relief. Felder, *supra*. *Not* only has the § 1983 form of action been repeatedly reinforced and broadened by this Court, but the § 1983 action is so fundamental and deeply embedded in our jurisprudence that any encroachment of that right by application of state law thereto has been condemned and made void. Felder, *supra*, at 2307;*Howlett*, *supra*; *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 110 S.Ct. 444, 107 L.Ed.2d 420 (1989).

State courts cannot impose barriers or prescribe requirements for a litigant to bring a § 1983 action in state court which would not be required in federal court. Felder, *supra* at 2314. This Court stated in *Felder*, *supra*, that § 1983 provides:

> "a unique federal remedy and any limitation or incursion by the application of state law or *procedure* on a § 1983 action brought in state court is preempted." (Emphasis supplied)

*Id.* at 2307.

In *Felder* plaintiff commenced a § 1983 action in state court without complying with Wisconsin's notice of claim statute, which required certain prerequisites to be compiled with before commencing an action against the State *in its own courts*. *The Felder* Court, in accord with its previous ruling in *Patsy*, *supra*, reaffirmed that state administrative remedies do not have to be exhausted before instituting a § 1983 action in state court and proceeded to further hold that "state law that immunizes government conduct otherwise subject to suit under § 1983 is preempted."*Id.* 2307. As a result, this Court held that a state's rule or law that in any way *limits* or *inhibits* a litigant in state court from prosecuting a § 1983 action is preempted. The classification of a valid federal § 1983 claim into something different by state *fiat* as, was done in this case, by the Appellate Division is *but another way* of limiting or inhibiting a litigant in state court from prosecuting its § 1983 claim.

Although the State defendants attempted to argue that petitioner's claim was not really a federal claim the Appellate Division did not reach the issue of whether petitioner had a federal claim, *vel non*. *The* Appellate Division merely ruled that because Concourse did not plead its § 1983 claim

properly, Concourse, therefore was not entitled to the three year state statute of limitations. The Appellate Division relying on *In the Matter of Medical Arts Sanitarium, Inc., v. New York State Department of Health*, 184 A.D.2d 399, 585 N.Y.S.2d 355 (1st Dep't 1992) held that petitioner's *conclusory* allegation that the DOH determination violates federal Medicaid Law does not translate its claim to a § 1983 action as a matter of *state law. This* holding of *Medical Arts*, as applied to petitioner is invalid, as a matter of *federal law*, to foreclose valid federal claims. Otherwise, if the decision was based on deficiency of the factual pleading the court would have had to allow Concourse to replead its federal claim to test the veracity of its federal cause of action. This it did not do.

The § 1983 remedy has been validated by this Court in *Wilder v. Virginia Hospital Association*, 496 U.S. 498, 110 S.Ct. 2510, 110 L.Ed.2d 455 (1990) to vindicate violations under the Medicaid Act. Similar to the situation at hand, in *Wilder*, there simultaneously existed a state administrative procedure to review the "complained of" conduct. The *Virginia Administrative Process Act*[5] provides that "any person affected by and claiming the unlawfulness of any regulation" can bring a direct action in court against the agency or its officers. Nevertheless, the *Wilder* Court adhering to its prior holding in *Patsy, supra*, expressly stated that availability of state administrative procedures does not foreclose resort to private remedies under § 1983 for enforcement of those rights. *Id.* at 2524-2525.

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[5] The Virginia Administrative Process Act is similar to the New York CPLR Article 78 proceeding.

While *Wilder* was a case that involved the Boren Amendment, § 1983 actions in the Medicaid context are not limited solely to Boren Amendment matters. Even after *Wilder*, § 1983 has routinely been the vehicle to obtain redress for violations under the Federal Medicaid Act for conduct that does not come within the scope of the Boren amendment. See *e.g.*, *Methodist Hospital v. Ind. Family and Social Services Administration*, 860 F.Supp. 1309 (N.D.Ind. Hammond Div. 1994)(medical provider had right enforceable under § 1983 to challenge improper adoption of regulation regarding appeal mechanism); *Rehabilitation Association of Virginia Inc. v. Kozlowski*, 42 F.3d 1444 (4th Cir. 1994) (§ 1983 was the appropriate vehicle to challenge State's interpretation of Medicaid Act); *Wood v. Tompkins*, 33 F.3d 600 (6th Cir. 1994) (violation of § 1396(n)[6] *et seq.* gives rise to a private right of action under § 1983); *Harris v. James*, 883 F.Supp. 1511 (M.D.Ala. N.Div. 1995) (private right of action exists under § 1983 to require the state to provide medical transportation pursuant to § 1396a(a)(4)(A)); *Visiting Nurse Assoc. v. Bullen*, 866 F.Supp. 1444 (D.Mass.1994) (§ 1983 is the proper remedy to enforce equal access provision of the Medicaid Act).

Petitioner's claim in this case challenging the State's unlawful calculation of its Medicaid rates and refusal to correct such rates by removing the declared invalid recalibration component from its rate calculation, as violating

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[6] References to § 1396(n) *et seq.* is made in connection with *Wood v. Tompkins, supra* and § 1396a(a)(4)(A) referred to in the *Harris v. James, supra*, case are not being relied on by the petitioner herein in support of its argument. It is for that reason the full text of those statutes are not set forth in this petition.

its rights under the federal Medicaid Act, fits squarely into a § 1983 claim. See *also Wilder, supra*, at 2525. Notwithstanding that petitioner, in accord with *Wilder,supra*, commenced its § 1983 action in state court, the Appellate Division held, in relevant part that, since "petitioner's challenge *could have been brought* in the form of an Article 78 proceeding" and that this case was not commenced within four months of the Level I administrative agency decision,[7] the case should be dismissed.(Emphasis added)

The Appellate Division's dismissal of petitioner's valid § 1983 claim turned on the fact that petitioner *also* had an alternative state remedy; an Article 78 proceeding under state law. While it is true that petitioner *could have* brought an Article 78 proceeding, it *deliberately* elected a specific federal remedy, a § 1983 cause of action. Having elected a federal remedy, Concourse should *not* be relegated to the State's desired form - an Article 78 proceeding. The State's attempt to force petitioner to relinquish the panoply of rights encompassed in a § 1983 action for those encompassed in an Article 78 proceeding must fail as a matter of *federal law. As* stated above, this Court since *Patsy* has consistently rebuked such efforts by states. The availability of an alternative state remedy should not render petitioner's valid and elected format; a § 1983 cause of action, untenable. Such action on the part of the state and the state court is but a novel attempt at undermining this Court's jurisdiction by the *creation of a*

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[7] In accordance with state law there is an administrative appeal process that a provider must exhaust before resort to the courts to challenge its Medicaid reimbursement rate.

*new road around Felder*; the renaming or conversion of federal claims to state claims so that the federal rights concomitant to § 1983 actions would not apply.

The only reason that the Appellate Division held that this case "could have been brought in the form of an Article 78 proceeding" is because it found this case to be "indistinguishable" from *McBarnette* (*NYC Health & Hosp. Corp. v. McBarnette*), 84 N.Y.2d 194, 616 N.Y.S.2d 1, 639 N.E. 2d 740 (1994).The single most critical distinguishing factor between *McBarnette* and the instant case, though, is that *McBarnette* was not commenced as a § 1983 action. Therefore, the principle of preempting state remedies as would apply in the case of the instant § 1983 action, as embodied in *Felder*, *supra*, and *Wilder*, *supra*, did not come into play in *McBarnette*. *Furthermore*, to the extent *McBarnette* can be read to be a basis to reject a litigant's § 1983 claim it conflicts with this Court's holdings in *Felder* and *Howlett* and, therefore, it must yield to the supremacy of federal law.

Nor should petitioner be bound by the four month statute of limitations applicable to an Article 78 proceeding. The § 1983 claim entitles petitioner to a three year statute of limitations in accordance with federal law. Wilson *v. Garcia*, *supra*. *This* Court held in *Wilson* that a § 1983 action is timely as a matter of federal law if brought within the longest tort limitation period of a particular state. In New York the longest tort limitation period is three years. See *also Owens v. Okure*, 109 S.Ct. 573, 488 U.S. 2235, 102 L.Ed.2d 594 (1989)(This Court reaffirmed its goal enunciated in *Wilson*, *supra* of providing "one simple, broad characterization" of all § 1983 actions and confirmed that the statute of limitations applicable to a § 1983 action is the state's general or residual personal injury statute of limitations).

The battle of the "forms of action" between a § 1983 action - a federal type of action -and the available state remedy - a CPLR Article 78 proceeding against the State - both of which could be maintained concurrently in the state courts, will frequently arise because they are both challenges to the sovereign's conduct. The State, though, will always prefer the Article 78 form since the limitations period is much shorter in New York.[8] Based on the Appellate Division's decision, the election of a § 1983 claim in state court may be foreclosed by the mere *existence* of the availability of an Article 78 proceeding in such forum. The Appellate Division's decision undermines the continued vitality of this Court's pronouncement of the law pertaining to § 1983 actions in the New York State's courts. It is for this Court, to clarify the state of the law in this regard and proclaim that it will not countenance this new and novel way around *Felder*. *This* Court should protect Congress' and its own interests in protecting the panoply of federal rights of § 1983 actions. If New York can do this end run around the Congress and this Court why couldn't and *wouldn't* every other state in the union do likewise?

**B. Petitioner sufficiently pled a cause of action under §1983.**

This Court has held that to prevail on a §1983 claim it must be established that:

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[8] There are a number of other reasons why the State would prefer the Article 78 form of action. Chief among them are the fact that there is no discovery available in an Article 78 proceeding without leave of court and, further, that it is a summary type of proceeding.

(i) The conduct complained of was committed by persons acting under color of state law and

(ii) that conduct deprived it of rights, privileges or immunities secured by the constitution or laws of the United States.

*Wilder*, *supra* at 2510.

In the seminal case *Maine v. Thiboutot*, 488 U.S.1, 100 S.Ct. 2502, 62 L.Ed.2d 555 (1980) this Court held that the plain language of § 1983 "undoubtedly embraces the Social Security Act."The Supreme Court in *Wilder*, *supra*, further held that causes of action alleging violation of the Medicaid Act are properly brought under § 1983.

Not only does Concourse have a valid § 1983 claim but it was appropriately pled. The complaint adequately alleges both of the aforementioned requirements of a § 1983 claim in accordance with *Wilder*. *The* State defendants argued below that the complaint "merely described" the Medicaid program. Specifically the complaint alleges that the State, acting "under color of state law" improperly applied and continues to apply the original recalibration regulation in computing Concourse's Medicaid rates notwithstanding that the Court of Appeals declared the recalibration regulation invalid in *NYSAC v. Axelrod*, *supra*. *Since* the original recalibration regulation was declared null and void, Concourse's Medicaid rates for all rate years in question, excluding 1988,[9] should have been

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[9] Obviously the State defendants acknowledged their unlawful conduct in refusing to correct Concourse's Medicaid rates because after the commencement of this lawsuit, the State adjusted Concourse's Medicaid rate for the 1988 rate year by removing the invalid recalibration

readjusted to reflect the invalidity of the recalibration regulations in the then pending lawsuit before the Level I decision was rendered. Such conduct by the State was designed to, and did, in fact, deprive Concourse of its rights under the Federal Medicaid Act.

The Appellate Division erroneously dismissed petitioner's § 1983 claim by adopting the State defendants' argument and incorrectly citing to *Medical Arts*, *supra*, as support for its decision. The Appellate Division held that the three year statute of limitations applicable to a § 1983 claim did not apply because, as in *Medical Arts*, *supra* "the petition recites a *conclusory* allegation that the determination violates federal Medicaid Law." (Emphasis supplied)However, no such argument can validly be made here because the complaint alleged both of the elements of a § 1983 claim required by *Wilder*. *As* a result the conclusory test is not *factually or legally* applicable and cannot be applied in the place of the two elements required by *Wilder*.

It is, therefore, clear that the basis for the dismissal could not be federal law since there was no basis therein for it. In fact, the basis must have been state law, *i.e.*, *Medical Arts*, which espouses a rule of summary judgment of federal claims if they are conclusorily pled without more. In a clear contradiction to the holdings of this Court, as stated, a party loses his right to the federal remedy in the New York State's

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adjustment from its Medicaid rate calculation. For rate year 1988, the State defendants' action in correcting Concourse's rate is evidence that Concourse proved its § 1983 claim in accordance with *Wilder*.

courts if such party didn't plead such claim correctly *in accordance with state law,*[10] the Claimant does not get another opportunity to correct its pleading deficiencies.

In this case petitioner claims that there is no need to replead since the complaint herein is replete with details of what the State did, and did not do, in accordance with, and in violation of, the particular applicable law. Not only does the instant complaint expressly provide in the jurisdiction paragraph that this action is commenced pursuant to §1983 to remedy violations of the Medicaid Act, 42 U.S.C. § 1396 and the 14th Amendment to the U.S. Constitution but it further provides a detailed description of the Federal Medicaid program, 42 U.S.C. §1396 *et seq.*, and the specific actions of the State defendants that constitute a violation of petitioner's rights under federal law. Moreover, the Answer, too, referred to each paragraph of the complaint and specifically referred to federal law numerous times. Unlike *Medical Arts*, *supra*, and based on all the foregoing references to federal law, there can be no claim of only "conclusory" references to the federal Medicaid law in this case. It was, therefore, error for the Appellate Division to dismiss the instant § 1983 action and to rely on *Medical Arts* as precedent.

But, most importantly, even assuming that the complaint was inartfully drawn, the Appellate Division should not have dismissed a federal § 1983 action on state law grounds. The Appellate Division erroneously relied on *Medical Arts* which

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[10]Another problem with this conclusorily pleading rule is that it is undefined. If this is claimed to be a federal rule as stated *infra*, it is in error. If it is a state rule it fails in this matter because of its conflict with the Supremacy Clause in the U.S. Constitution.

is a *state law* decision guided by state law. If a valid federal case is brought in state court, the law to be applied is federal and not state law. See, *Felder, supra*; *Howlett, supra*; *Svaigsen v. City of New York*, 203 A.D.2d 32, 609 N.Y.S.2d 894 (1st Dep't 1994).Thus, as set forth above, based on the pleading requirements of a § 1983 claim, Concourse properly pled its § 1983 claim in this case.

Even assuming *arguendo* that it could be claimed that Concourse did not sufficiently plead a § 1983 claim or that the pleading "conclusorily" alleged a violation of federal Medicaid law, under the liberal pleading requirements in federal practice as repeatedly reaffirmed by this Court in *Conley v. Gibson*, 355 U.S. 41, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957) and *Foman v. Davis*, 371 U.S.178, 83 S.Ct. 227, 9 L.Ed.2d 222 (1962), and the rule to liberally permit amendment of pleadings, leave to replead should have been granted if a reading of a "federal" complaint gives even the slightest indication that a valid claim exists. See, *Ribbiuti v. N.Y.S. Transit Authority*, 941 F.2d 119 (2d Cir. 1991); *Branum v. Clark*, 927 F.2d 698 (2d Cir. 1991).The federal rules do not require a claimant to set out in detail the facts upon which the claim is based. All the rules require is a "short and plain statement of the claim that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests."*Conley, supra* at 103. The goal of pleadings in federal practice is to facilitate a proper decision on the merits, *Foman, supra*, at 230, and not to summarily reject them, particularly in the cavalier manner that the Appellate Division treated petitioner's claim.

The dismissal of petitioner's § 1983 action erodes the continued vitality of *Felder supra*, and its progeny. If the Appellate Division decision is allowed to stand its impact will be far reaching. Guided by the New York State courts, other

jurisdictions, too, will carve out a similar procedure to circumvent litigating § 1983 actions in state court. As such, the § 1983 claimant will not benefit from the application of federal procedures attendant to all other federal claims brought in state courts; and this may, in fact, be the precursor of how New York State may now treat all other federal claims brought in its courts. It is for this Court to intervene to insure that the Congressional intent in enacting § 1983 and this Court's interest in its rulings are upheld.

This Court should grant petitioner a *writ of certiorari* and do what it did in *Felder* and *Wilder* and sustain petitioner's complaint by reversing the decision of the Appellate Division. That would have the effect of conforming the § 1983 practice in the New York State's courts to the practice in federal courts. This Court's policy making function makes it the appropriate forum to render such a pronouncement.

## CONCLUSION

For these reasons, a *writ of certiorari* should be issued to review the opinion and judgment of the Appellate Division.

Dated: New York, New York
June 26, 1996

Respectfully submitted,

**NEIMAN GINSBURG**
**& MAIRANZ P.C.**
*Attorneys for Petitioner*
*Concourse Nursing Home*
39 Broadway - 25th Floor
New York, New York 10006
(212) 269-1000

*Of Counsel:*
Marvin Neiman, Esq.
Theodore T. Mairanz, Esq.
Betsy R. Malik, Esq.

# APPENDICES

## APPENDIX A

## OPINION AND ORDER (WITH NOTICE OF ENTRY) OF THE STATE OF NEW YORK SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT DATED SEPTEMBER 7, 1995

# Supreme Court of the State of New York County of New York

**NOTICE OF ENTRY**

Index No. 13281/92

CONCOURSE NURSING HOME,

*Plaintiff-Respondent,*

-against-

CESAR A. PERALES, individually and as Commissioner of the New York State Department of Social Services, LORNA H. McBARNETTE, individually and as Acting Commissioner of the New York State Department of Health, and PATRICK J. BULGARO, individually and as Budget Director of the State of New York,

*Defendants-Appellants.*

PLEASE TAKE NOTICE, that the within is a true and complete copy of an order duly filed and entered in the office of the Clerk of the Court, Supreme Court of the State of New York, Appellate Division, First Department, on September 7, 1995.

Dated: New York, New York
September 22, 1995

Yours, etc.,

**DENNIS C. VACCO**
Attorney General of the State of New York
Attorney for Defendants
120 Broadway
New York, New York 10271
(212) 416-8560

TO:

**NEIMAN GINSBERG & MAIRANZ, P.C.**
39 Broadway, 25th Floor
New York, New York 10006
(212) 269-1000

**APPELLATE DIVISION, SUPREME COURT**
**FIRST DEPARTMENT**

SEPTEMBER 7, 1995

THE COURT ANNOUNCES THE
FOLLOWING DECISIONS:

Murphy, P.J., Rubin, Kupferman, Ross, Mazzarelli, JJ.

55145, Concourse Nursing Home,

*Plaintiff-Respondent,*
M. Neiman

-against-

Cesar A. Perales, etc., et al.,

*Defendants-Appellants,*
B.K. Hathaway

Order and judgment (one paper), Supreme Court, New York County (Harold Tompkins, J.), entered June 8, 1994, which granted plaintiff's summary judgment motion, directing the New York State Department of Health to recompute plaintiff's Medicaid reimbursement rate for 1987 through and including 1991, referred that portion of the action for interest, attorneys' fees, costs and disbursements to a special referee, and denied defendants' cross-motion to dismiss the complaint, except as to Patrick J. Bulgaro, as Budget Director of the State of New York, and defendants individually, unanimously reversed, on the law, to the extent appealed from, the motion denied and the cross motion granted, and the complaint dismissed, without costs.

Plaintiff nursing home receives payments under the Medicaid program (Title XIX of the Social Security Act, 42 USC §1396 et seq.), funded jointly by the Federal and State

governments. This appeal arises out of a dispute as to the formula used to determine plaintiff's payment rate for the years 1987 through 1991.

Prior to 1986, the New York State Department of Health calculated a prospective Medicaid reimbursement rate for nursing homes (residential health care facilities) based on the operational costs of a base year, as limited by cost ceilings determined by comparison to peer groups, which was then increased to account for inflation and capital costs. The rate was expressed as a per diem amount for each patient.

In 1986, the Department of Health implemented a new Medicaid reimbursement calculation for nursing homes, the Long Term Care Case Mix Reimbursement System. Under this system, the daily per-patient rate is calculated by four cost components: direct, indirect, noncomparable and capital (10 NYCRR 86-2.10 [b] [1] [ii]). The new system resulted in increased rate payments due, in part, to improved documentation of patients rather than any actual increase in costs. Therefore, the Department of Health promulgated a "recalibration" system, to become effective July 1, 1987 and apply retroactively to January 1, 1987. The Court of Appeals, in *New York State Assn. of Counties v Axelrod* (78 NY2d 158), annulled the recalibration system because it arbitrarily reduced every facility's "direct component" rate by 3.035%, without regard to whether a facility's costs increased due to documentation or actual expenses.

In 1991, the Department of Health promulgated a new recalibration regulation applicable to calculation of the 1989-1991 reimbursement rates based on the individual needs of each nursing home. *In Matter of Jewish Home & Infirmary v Commissioner of New York State Dept. of Health* (84 NY2d 252, 260), the Court of Appeals held that the regulation could

not be applied retroactively to 1989-1991 because it would violate Public Health Law §2807 (7) (a), requiring advanced notification to a nursing home of its approved rate of payment.

In a notice dated April 30, 1991, the Department of Health notified residential health care facilities that "the methodology used by the Commissioner to promulgate the Medicaid rates is not included as a rate appeal issue in Sections 86-2.13 and 86-2.14. Appeals objecting to the Medicaid rate methodology are inappropriate under the regulations and will be rejected." Nevertheless, plaintiff Concourse Nursing Home filed a first level administrative appeal (10 NYCRR 86-2.13) challenging the recalibration of its 1988 to 1990 rates. This appeal was denied by the Department by letter dated July 30, 1991. Plaintiff also filed a first level appeal from its 1991 recalibration rates, which was rejected by letter dated May 15, 1991 on the ground that the rate calculation is not appealable.

Plaintiff subsequently filed a "second level" administrative appeal (10 NYCRR 86-2.14 [b] [1]) on August 30, 1991, seeking review of the 1987 to 1991 reimbursement rates (even though it never filed a level one appeal with respect to its 1987 reimbursement rate). On December 23, 1991, the Department of Health rejected that request on the grounds that the issues were not appealable. Plaintiff commenced this action on April 16, 1992, seeking declaratory and injunctive relief.

Supreme Court granted plaintiff's summary judgment motion, holding that the Department of Health's rate determinations for 1987 through 1991 were arbitrary and capricious and directed the Department to recompute the rates for those years. The Court, citing our decision in *New York City Health & Hosps. Corp. v McBarnette* (195 AD2d 391), applied a Statute of Limitations of three years. In *McBarnette*, we followed the determination of the United States Court of

Appeals for the Second Circuit in *Hollander v Brezenoff* (787 F2d 834), holding that such an action constitutes a claim to recoup funds due under 42 USC §1396 and is subject to the provisions of CPLR 214(2), applicable to a liability created or imposed by statute. The Court of Appeals subsequently modified the decision in *McBarnette* (84 NY2d 194), holding that the four-month limitations period applicable to proceedings for review of an administrative determination pursuant to CPLR article 78 should control. The Court noted: "The nature of plaintiff's claim requires it to convince the court that defendants promulgated a rule affecting hospital rates that represented an irrational construction of the governing statutes * * * Accordingly, plaintiff's challenge could have been brought in the form of an article 78 proceeding" (*supra*, at 205).

The nature of the instant action is indistinguishable from *McBarnette* (*supra*) and is therefore subject to a four-month Statute of Limitations. As this Court noted in *Matter of Medical Arts Sanitarium v New York State Dept. of Health* (184 AD2d 399, 399-400), a proceeding is not "subject to the three-year limitations period set forth in CPLR 214(5) applicable to claims brought under 42 USC §§1983 and 1396a(a) (13) (A) (the Boren Amendment), merely because the petition recites a conclusory allegation that the determination violates Federal Medicaid Law."

Plaintiff argues that its action is nevertheless timely because it was commenced within four months of respondent Department of Health's denial of its second level administrative appeal on December 23, 1991. It is well settled, however, that "an administrative determination is final and binding when it has an impact upon a petitioner" (*Matter of Filut v New York State Educ. Dept.*, 91 AD2d 722, 723). "Neither an application for reconsideration nor a series of

inquiries regarding reconsideration will extend or toll the four-month Statute of Limitations" (id. [citations omitted]).

Plaintiff was on notice as early as April 30, 1991 that the Department of Health would not entertain an administrative appeal concerning the calculation of Medicaid reimbursement rates. Plaintiff's persistence in filing second level administrative appeals, following rejection of its first level appeals, does not operate to extend the time to commence a proceeding for administrative review pursuant to CPLR article 78. If the Department of Health did not initially undertake to review the propriety of plaintiff's Medicaid rate, it certainly cannot be said to have engaged in a "fresh and new redetermination" of that rate *(Matter of Corbisiero v New York State Tax Commn.*, 82 AD2d 990, affd 56 NY2d 680) so as to toll the running of the Statute of Limitations. This matter was therefore untimely commenced and must be dismissed.

THIS CONSTITUTES THE DECISION AND ORDER OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: SEPTEMBER 7, 1995

Catherine O'Hagan Wolfe
/signature
CLERK

## APPENDIX B

## ORDER (WITH NOTICE OF ENTRY) OF THE STATE OF NEW YORK SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT DATED DECEMBER 21, 1995

# Supreme Court of The State of New York

**Appellate Division : First Department**

Concourse Nursing Home,

*Plaintiff - Respondent,*

-against-

CESAR A. PERALES, individually and as Commissioner of The New York State Department of Social Services, LORNA H. McBARNETTE, individually and as Acting Commissioner of the New York State Department of Health, and PATRICK J. BULGARO, individually and as Budget Director of the State of New York,

*Defendants - Appellants.*

**NOTICE OF ENTRY**

Index No. 13281/92

PLEASE TAKE NOTICE, that the within is a true and complete copy of an order duly filed and entered in the office of the Clerk of the Court, Supreme Court of the State of New York, Appellate Division, First Department, on December 21, 1995.

Dated: New York, New York
December 29, 1995

Yours, etc.,

**Dennis C. Vacco**
Attorney General of the State of
New York
Attorney for Defendants
120 Broadway
New York, New York 10271
(212) 416-8560

To:

**NEIMAN, GINSBERG**
**& MAIRANZ, P.C.**
Attorneys for Plaintiff
39 Broadway, 25th floor
New York, New York 10006
(212) 269-1000

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on December 21, 1995

Present - Hon. Francis T. Murphy
Presiding Justice

Israel Rubin
Theodore R. Kupferman
David Ross
Angela M. Mazzarelli
Justices.

Concourse Nursing Home,

*Plaintiff - Respondent,*

-against-

Cesar A. Perales, etc. , et al.,

*Defendants - Appellants.*

M-5856

Index #13281/92

Plaintiff - respondent having moved for reargument of the decision and order of this Court entered on September 7, 1995 (Appeal No. 55145), or , in the alternative, for leave to appeal to the Court of Appeals,

Now, upon reading and filling the papers with respect to the motion, and due deliberation having been had thereon,

It is ordered that the motion be the same hereby is denied in its entirety with $100 costs.

ENTER:

Catherin O'Hagan Wolfe
/signature
Clerk.

**APPENDIX C**

**ORDER OF THE STATE OF NEW YORK COURT OF APPEALS DATED APRIL 2, 1996 DENYING APPELLANT'S MOTION FOR LEAVE TO APPEAL**

# State of New York
# Court of Appeals

/stamp
Donald M. Sheraw
Clerk of the Court

Clerk's Office
Albany, New York 12207

DECISION April 2, 1996

1 - 13 Mo. No. 189

Concourse Nursing Home,

*Appellant,*

vs.

Cesar A. Perales, &c., et al.,

*Respondents.*

Motion for leave to appeal denied with one hundred dollars costs and necessary reproduction disbursements.

## APPENDIX D

## OPINION AND ORDER (WITH NOTICE OF ENTRY) OF THE SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF NEW YORK DATED MARCH 1, 1994

# Supreme Court
# of the State of New York

**COUNTY OF NEW YORK**

CONCOURSE NURSING HOME,

*Plaintiff,*

-against-

CESAR A. PERALES, individually and as Commissioner of the New York State Department of Social Services, LORNA H. McBARNETTE, individually and as Acting Commissioner of the New York State Department of Health, and PATRICK BULGARO, individually and as Budget Director of the State of New York,

*Defendants.*

Index No. 13281/92

**NOTICE OF ENTRY**

Assigned to:
Hon. Harold Tompkins
IAS Part 13

PLEASE TAKE NOTICE, that the within is a true copy of the Order and Judgment granted on March 1, 1994, and duly entered in the Office of the Clerk of the within named Court on June 8, 1994.

Dated: New York, New York
June 9, 1994

**NEIMAN GINSBURG**
**& MAIRANZ P.C.**
*Attorneys for Plaintiff*
39 Broadway - 25th Floor
New York, New York 10006
(212) 269-1000

TO:
**OLIVER KOPPELL**
Attorney General of the State of New York
120 Broadway
New York, New York 10271

At IAS Part 13, of the Supreme Court of the State of New York, held in and for the County of New York, at the Courthouse located at 60 Centre Street, New York, New York on the 1 of March 1994.

ORDER AND JUDGMENT
Index No. 13281/92

P R E S E N T :
HON. HAROLD TOMPKINS, JUSTICE

CONCOURSE NURSING HOME,

*Plaintiff,*

-against-

CESAR A . PERALES, individually and as Commissioner of the New York State Department of Social Services, LORNA H. McBARNETTE, individually and as Acting Commissioner of the New York State Department of Health, and PATRICK J. BULGARO, individually and as Budget Director of the State of New York,

*Defendants.*

UPON the Notice of Motion of plaintiff by its attorneys Neiman Ginsburg & Mairanz P.C., dated February 17, 1993, for an Order pursuant to CPLR 3212 granting summary judgment to plaintiff and dismissing defendants' affirmative defenses, and the notice of cross-motion of defendants by Robert Abrams, Attorney General of the State of New York dated March 23, 1993, and said motion and cross motion having regularly come on to be heard on June 4, 1993 and upon reading and filing said notice of motion of plaintiff, the affidavit of Marvin Neiman, Esq., sworn to on February 17, 1993 and the exhibits annexed thereto in support of the motion, the aforesaid notice of cross-motion for summary judgment of defendants, the affidavit of Carl M. Dembrovsky sworn to on March 22, 1993 the affidavit of Joseph C. Bierman, sworn to on March 19, 1993 and the exhibits annexed thereto in support of defendants' cross-motion and in opposition to plaintiff's motion and the reply affidavit of Marvin Neiman sworn to on March 30, 1993 and the exhibits annexed thereto in support of the motion and in opposition to defendants' cross-motion and

after hearing counsel for the respective parties, and after due deliberation having been held thereon and upon the Court's decision dated January 7, 1994, it is ordered that plaintiffs motion for summary judgment is granted and it is further

ORDERED, that defendants cross motion for summary judgment is granted; to the extent that the action is dismissed as to the defendants in their individual capacities and against defendant Bulgaro, the budget director in his official capacity and is otherwise denied and it is further

ORDERED, and adjudged, that the Department of Health rate determinations for rate periods 1987 through and including 1991 are arbitrary and capricious and in violation of applicable law; and it is further

ORDERED, that defendants' are directed to recompute and promulgate corrective rates for plaintiff for the rate periods 1987 through and including 1991 in accordance with the applicable law; and it is further

ORDERED, that the portions of the action for interest, reasonable attorneys fees, and costs and disbursements are severed and referred to a special referee to hear and report (with recommendations) pending the report and motion thereon pursuant to CPLR 4413 that portion of the motion is held in abeyance - Counsel is directed to serve a copy hereof upon the clerk of the legal support office to arrange for a hearing date before a special referee.

ENTER:

/Signature
J.S.C.

Norman Goodman
Clerk

FILED
JUN 8 1994
COUNTY CLERK'S OFFICE
NEW YORK

# Supreme Court,

**NEW YORK COUNTY**
**IAS PART 13**

CONCOURSE NURSING HOME,

*Plaintiff,*

-against-

CESAR A. PERALES, individually and as Commissioner of the New York State Department of Social Services, LORNA H. McBARNETTE, individually and as Acting Commissioner of the New York State Department of Health, and PATRICK BULGARO, individually and as Budget Director of the State of New York,

*Defendants.*

Index No. 13281/92
Motions Submitted
June 4, 1993

HAROLD TOMPKINS, JUSTICE:

Plaintiff Concourse Nursing Home's motion for summary judgment and defendants' cross motion for summary judgment dismissing the complaint are consolidated for disposition and decided as noted below.

This action involves the Medicaid reimbursement rates for the 1987-1991 rate years in which plaintiff has challenged the

recalibration methodology used by defendant Health Department. Plaintiff seeks a recomputation of rates for the 1987-1991 rate years without recalibration.

The Health Department's original recalibration regulation ( former §86-2.31 of Title 10 of NYCRR), promulgated in 1986 to effect an across-the-board percentage reduction in Medicaid reimbursement rates of New York State residential health care facilities for rate periods commencing on or after January 1, 1987, was declared invalid by the New York Court of Appeals as lacking a rational basis, *New York Association of Counties v. Axelrod,* 78 N.Y2d 158 (1991). Subsequently, the Appellate Division, Third Department held in *New York State Association of Counties v. Axelrod,* ____A.D.2d____, 595 N.Y.S. 258, lv denied 82 N.Y.2d 705, that the successor recalibration regulations (present §86-2.31 of Title 10 NYCRR), promulgated in December, 1991, to govern 1989 through 1991 rate years, was based upon the same flawed methodology as the original regulation, and that the 1991 regulation could not be retroactively applied to 1989 through 1991 rate years, due to DOH's failure to comply with the requirement of Public Health Law §2807 (7) (a) that facilities be notified of their rates of payment at least 60 days prior to the effective date.

The Third Department decision was adopted by the Appellate Division, First Department in granting summary judgment for the plaintiff in *N.Y.C. Health & Hospitals Corp. v McBarnette, ____A.D.2d____, 600 N.Y.S.2d 245 (1st Dept. 1993). McBarnette* held that the Appellate Division, Third Department's holding in *New York State Association of Counties v Axelrod,* that the recalibration regulations were still being used by the governmental entities; that the recalibration regulations were invalid based upon flawed methodology, and that the appropriate statute of limitations, was three years since

the action was an attempt to recoup funds due under the reimbursement provisions of 42 U.S.C. §1396 was a binding determination on these regulations. Since New York State Association of Counties, supra and McBarnette, supra have determined the invalidity of the Medicaid reimbursement rates for the challenged years as a matter of law, plaintiff Concourse Nursing Home's motion for summary judgment must be granted and defendants' cross motion for summary judgment must be denied.

Settle order accordingly.

Dated: January 7, 1994.

/Signature
J.S.C